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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JORGE HERNANDEZ**,** Defendant.	Criminal Case No. 07cr2953-IEG **GOVERNMENT'S MOTION FOR:** **(1) FINGERPRINT EXEMPLARS** **(2) RECIPROCAL DISCOVERY** **TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES** Date: January 22, 2008 Time: 2:00 p.m. Court: The Hon. Irma E. Gonzalez

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, United States Attorney, Karen P. Hewitt, and Assistant U.S. Attorney Rebecca S. Kanter, and hereby files its Motion for Fingerprint Exemplars and Reciprocal Discovery in the above-referenced case. This Motion is based upon the files and records of this case, together with the attached Statement of Facts and Memorandum of Points and Authorities.

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I

STATEMENT OF FACTS

A. Defendant's Apprehension

On September 4, 2007, at about 4:00 a.m., Defendant attempted to enter the United States from Mexico near Tecate, California. Defendant was first spotted by a California National Guard Unit operating a mobile infrared scope. Defendant was seen crossing the United States/Mexico boundary and hiding in the brush near Ceti's Hill, which is approximately 2 miles east and 100 yards north of the Teacate, California Port of Entry. Defendant was found lying down in the brush approximately 30 yards south of the Border Road. The Defendant admitted to being a citizen and national of Mexico with no documents to legally remain in the United States. Defendant was transported to the Tecate Processing Center.

B. Defendant's Criminal and Immigration History

Defendant has numerous arrests and convictions in California and Oregon. Defendant's more recent felony criminal history includes but is not limited to a conviction in the United States District Court for the Southern District of California on February 1, 2002, for Illegal Entry in violation of Title 8, United States Code Section 1325. Defendant was sentenced to 24 months in custody by The Honorable Gordon Thompson, Jr.

Prior to that, Defendant was convicted in March, 1997, by the California Superior Court in Santa Clara for Possession of Marijuana for Sale in violation of California Health & Safety Code Section 11359, for which he received a sentence of 2 years imprisonment. Ten years later, in May, 2007, Defendant sustained a conviction in the California Superior Court in Santa Ana for Possession of a Controlled Substance in violation of California Health & Safety Code Section 11377(a).

Defendant appeared before an Immigration Judge for a deportation hearing on November 20, 2005, and was physically removed from the United States to Mexico that same day. Defendant was most recently physically removed to Mexico on August 22, 2007, approximately two weeks before the instant offense.

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C. Defendant's Post-Miranda Confession

Defendant was read his Miranda rights and advised of his right to notify the Mexican Consulate. Defendant waived his rights and admitted that he is a citizen and national of Mexico with no documents to legally enter or remain in the United States. He further admitted to having been previously deported from the United States. He stated that he knew he was breaking the law by crossing into the United States through the mountains. He admitted to prior arrests and a prior drug conviction. He stated he was en route to Santa Ana, California to find work.

II

UNITED STATES' MOTIONS

A. FINGERPRINT EXEMPLARS

The United States requests that the Court order that Defendant make himself available for fingerprinting by the United States' fingerprint expert. See United States v. Ortiz-Hernandez, 427 F.3d 567, 576-77 (9th Cir. 2005) (Government may have defendant fingerprinted and use criminal and immigration records in Section 1326 prosecution). The privilege against self-incrimination only applies to testimonial evidence. See Schmerber v. California, 384 U.S. 757, 761 (1966) (withdrawal of blood is not testimonial). Identifying physical characteristics, including fingerprints, are not testimonial in nature and the collection and use of such evidence does not violate Defendant's Fifth Amendment right against self-incrimination. United States v. DePalma, 414 F.2d 394, 397 (9th Cir. 1969).

B. RECIPROCAL DISCOVERY

The Government has and will continue to fully comply with its discovery obligations. On September 21, 2007, the Government provided Defendant's previous attorney, Erick Guzman at Federal Defenders of San Diego, Inc., with 46 pages of discovery and one CD. The Government has requested Defendant's A-File, and will provide the audiotape from Defendant's November 20, 1995, hearing before an Immigration Judge as soon as it is available. Furthermore, the Government will request that the arresting agency preserve any evidence the Government intends to introduce in its case-in-chief or that may be material to the defense. The Government moves the Court to order Defendant to provide all reciprocal discovery to which the United States is entitled under Rules 16(b) and 26.2. Rule 16(b)(2) requires Defendant to disclose to the United States all exhibits and documents which Defendant "intends to introduce as evidence in chief at the trial" and a written summary of the names, anticipated testimony, and bases for opinions of experts the defendant intends to call at trial under Rules 702, 703, and 705 of the Federal Rules of Evidence.

III

CONCLUSION

For the foregoing reasons, the Government requests that the Court grant the Government's motion for reciprocal discovery and compelling the Defendant to provide a fingerprint exemplar.

DATED: January 17, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

/s/***Rebecca Kanter***
REBECCA S. KANTER
Assistant United States Attorney
Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,	)	Criminal Case No. 07cr2953-IEG
v.	)	CERTIFICATE OF SERVICE
JORGE HERNANDEZ, Defendant.	)	

IT IS HEREBY CERTIFIED THAT:

I, REBECCA S. KANTER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **MOTION FOR FINGERPRINT EXEMPLARS AND RECIPROCAL DISCOVERY** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Michael E. Burke

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 17, 2008.

/s/ ***Rebecca Kanter***
REBECCA S. KANTER